

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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date: August 22, 2001

to: Thomas W. Wilson
Director - Communications, Technology and Media: Oakland

from: James W. Clark
Area Counsel - Communications, Technology and Media: Oakland

subject: **Disclosure Consents Generally Required Before Disclosures Are Made
To Corporate Employees**

This memorandum responds to your request for advice regarding the disclosure of returns and return information to corporate officers and employees. In particular, this memorandum discusses the corporate officers and employees to whom a revenue agent may disclose returns and return information during the course of an examination of a large corporation. In accordance with I.R.C. § 6110(k)(3) this memorandum should not be cited as precedent.

A. Conclusions

The IRS may disclose tax information to certain high level corporate officers. In addition, the IRS may disclose tax information to corporate employees engaged in practice before the IRS if such employee is included in a valid power of attorney ("POA"). Finally, the IRS can disclose tax information to any person provided that the corporation gives its prior consent pursuant to IRC § 6103(c) and Treas. Reg. § 301.6103(c)-1T.

In the absence of a POA or a consent, disclosures may be made to a corporate officer or employee when necessary to obtain information not otherwise reasonably available, in accordance with I.R.C. § 6103(k)(6) and Treas. Reg. § 301.6103(k)(6)-1. However, for ongoing dealings with the taxpayer's employees we recommend that you obtain the POAs and consents described in this memorandum.

B. Practical Recommendations

1. The corporate taxpayer should issue a POA to the Tax Director that expressly authorizes that individual to "execute section 6103(c) consents." It should be signed by a corporate officer

with the power to bind the corporation. This will allow the Tax Director to grant all subsequent disclosure consents without the need to bring in high level corporate officers.

2. The audit team should get a general purpose consent for the audit cycle period. It should authorize disclosure of tax information to present and future members of the Tax Department, including but not limited to specifically named individuals who the agents know they will be dealing.

3. Written disclosure consents should be obtained with respect to additional corporate employees with whom the revenue agents will be dealing.

4. While oral disclosure consents are valid, we recommend the use of written disclosure consents. If taxpayer information is disclosed pursuant to an oral consent, we recommend that this be followed up with a written consent documenting that the oral consent was given and that future disclosures are authorized.

C. Discussion

1. A Power of Attorney Can Authorize the Tax Director to Grant Disclosure Consents

We understand that it has been a common business practice for examination teams to deal directly with a Tax Director (or similar executive) who is responsible for representing the corporation and coordinating the taxpayer's audit compliance. A Tax Director regularly advocates the taxpayer's position, and thus we believe it is proper for the corporate taxpayer to grant the Tax Director a POA since he or she is "practicing before the IRS" in representing the corporation. The POA must be executed by an officer of the corporation having the authority to legally bind the corporation. The standard POA, Form 2848, will permit disclosure of taxpayer information to the Tax Director as attorney-in-fact.¹

However, the Tax Director is usually not a high level corporate officer. Therefore, unless special language is added to the POA, this individual is not authorized to grant additional disclosure consents under § 6103(c).

¹ The corporation is authorized to grant a POA to the Tax Director as an employee of the corporation. The Tax Director need not be an attorney. See Form 2848, Part II (Declaration of Representative).

The solution is to add special language to the POA. The corporation needs to expressly state that the Tax Director is authorized to "execute section 6103(c)consents." This express authorization must be written into section 5 of the POA, Form 2848. It is not part of the standard form. A sample of the modified form is attached. From that point forward the Tax Director would be authorized to grant disclosure consents with respect to that audit. This would allow the audit team to continue the customary business practice of dealing primarily with the Tax Director without the need to repeatedly bring in high level corporate officers to consent to disclosures to corporate employees.

2. High Level Corporate Officer Defined

A high level corporate officer authorized to receive taxpayer information and to grant disclosure consents (even without a POA) is any person designated by resolution of the corporate board of directors or any similar governing body; and any officer or employee of the corporation upon written request signed by any principal officer and attested to by the secretary or other officer. IRC § 6103(e)(1)(D)(i) & (ii), (7). In addition a high level corporate officer includes any corporate officer authorized by the corporation in accordance with applicable State law to legally bind the corporation. IRM 1.3.2.4.3(1).

The IRM further provides that a corporate officer authorized to legally bind the corporation includes, but is not limited to, the president or other chief executive officer of the corporation. With regard to proof that the IRS may require to determine which officers have authority to legally bind the corporation, the IRM provides that generally a written statement by the officer, on corporate letterhead stating that he or she has the authority to legally bind the corporation is sufficient to permit disclosure. IRM 1.3.2.4.3(1)(b). If necessary, this can also be verified verbally on the telephone, though we recommend that you obtain this statement in writing. See IRM 1.3.2.4.3(1)(c).

3. We Recommend Written Disclosure Consents

There are two types of consents under § 6103(c): general purpose consents, Treas. Reg. § 301.6103(c)-1T(b) (written consents); and consents to disclosures relating to a taxpayer's request for information or assistance with regard to a tax matter, Treas. Reg. § 301.6103(c)-1T(c) (written or oral consents).

a. General Purpose Consents - Form 8821

A valid general purpose consent may be used to enable revenue agents to disclose tax information to a corporate employee who is acting as a contact point with regard to an IRS examination. The consent must properly identify the type of tax or items of tax information to be disclosed to the corporate employee. For example, if the examination related to the corporation's Forms 1120 for 1995 and 1996, the relevant portion of the consent could state "1995 and 1996 Forms 1120."

Under the regulatory requirements for a general purpose consent, the consent must be in the form of a separate written document (such as one side of an 8 ½" by 11" piece of paper or a separate computer screen) pertaining solely to the authorized disclosure. Treas. Reg. § 301.6103(c)-1T(b). The document must be signed and dated by the taxpayer. In the case of a corporation, the consent must be signed by "any officer of the entity with authority under applicable State law to legally bind the entity[.]" Id. § 301.6103(c)-1T(e)(4). It must contain the identity of the taxpayer, the identity of the designee,² the tax year, and the type of tax or items of tax information to be disclosed. The Form 8821 has been designed to meet the requirements of this part of the regulation.

If a corporate officer has executed the aforementioned POA in favor of the Tax Director specifically authorizing him/her to grant Sec. 6103(c) consents, the Tax Director may sign the general purpose consent.

b. Consent to Disclosure Regarding Taxpayer Request for Information or Assistance

Under Treas. Reg. § 301.6103(c)-1T(c), the IRS may sometimes disclose tax information to a third party when the taxpayer requests that such third party provide information or assistance with regard to a tax matter. Disclosures under Treas. Reg. § 301.6103(c)-1T(c) are appropriate, for example, where the taxpayer brings a friend or relative to a meeting for moral support or general assistance. By analogy, we believe that where a corporate employee (who is not practicing before the IRS) acts as a contact point for a corporate examination, disclosures under this part of the regulation would be appropriate.

Under Treas. Reg. § 301.6103(c)-1T(c)(1), the writing must be signed and dated by the taxpayer and contain the taxpayer's

²If there is more than one designee, a list may be attached.

identity, the identity of the designee, and sufficient facts underlying the request for information or assistance to enable the IRS to determine the nature of the assistance requested and the tax information to be disclosed. Under this part of the regulation, the writing does not have to pertain solely to the authorized disclosure -- the authorization may be included in another document. For example, an audit plan, as described below, would qualify.

c. The Audit Plan can Serve as a Limited Written Disclosure Consent

The audit plan can serve as a limited consent to the disclosure of taxpayer information. If it designates the corporate employees who will work with the IRS during the audit and receive tax information, and it is signed and dated by a high level official with authority to execute a consent, the audit plan can function as a consent under Treas. Reg. § 301.6103(c)-1T(c)(1). However, those employees listed in the audit plan would not in turn be entitled to grant disclosure consents absent a POA expressly authorizing them to do so, as described above.

Thus, while the audit plan may allow for limited disclosure, the better, safer course of action is to obtain the broad general disclosure consent described above.

4. Oral Disclosure Consents are Permitted but Not Recommended

It is possible to obtain an oral consent to disclose taxpayer information to persons under § 6103(c). See Treas. Reg. § 301.6103(c)-1T(c)(2) (oral consents relating to a taxpayer's request for information or assistance with regard to a tax matter). For example, if a high level corporate officer brings to a meeting employees to assist in presenting the taxpayer's position, your agents may make disclosures after they obtain the assurance of the officer that disclosure is authorized to those persons. Similarly, if the Tax Manager has a POA authorizing him or her to grant disclosure consents, he or she can consent to the disclosure. However, the mere presence of persons in a meeting, even at the invitation of a corporate officer, does not imply that a corporate consent has been given. The revenue agents must expressly ask whether the disclosure of taxpayer information is permitted.

In light of this, we recommend that the revenue agents obtain the consents in writing in order to forestall any later allegation that any disclosures were unauthorized. However, the fact that oral consents are permitted will give your agents some latitude if disclosures are made after the oral consent is

granted. We recommend that even if an oral consent is granted, and disclosures are made, the revenue agents follow up with a written disclosure consent stating that the disclosures were verbally authorized and that future disclosures are authorized.

If you have any further questions, please contact Area Counsel James Clark at (510) 637-4627 or Associate Area Counsel Michael Lackner at (213) 894-3027.

JAMES W. CLARK
Area Counsel
(Communications, Technology and
Media: Oakland)

Attachments

Sample POA Authorizing Disclosure Consents